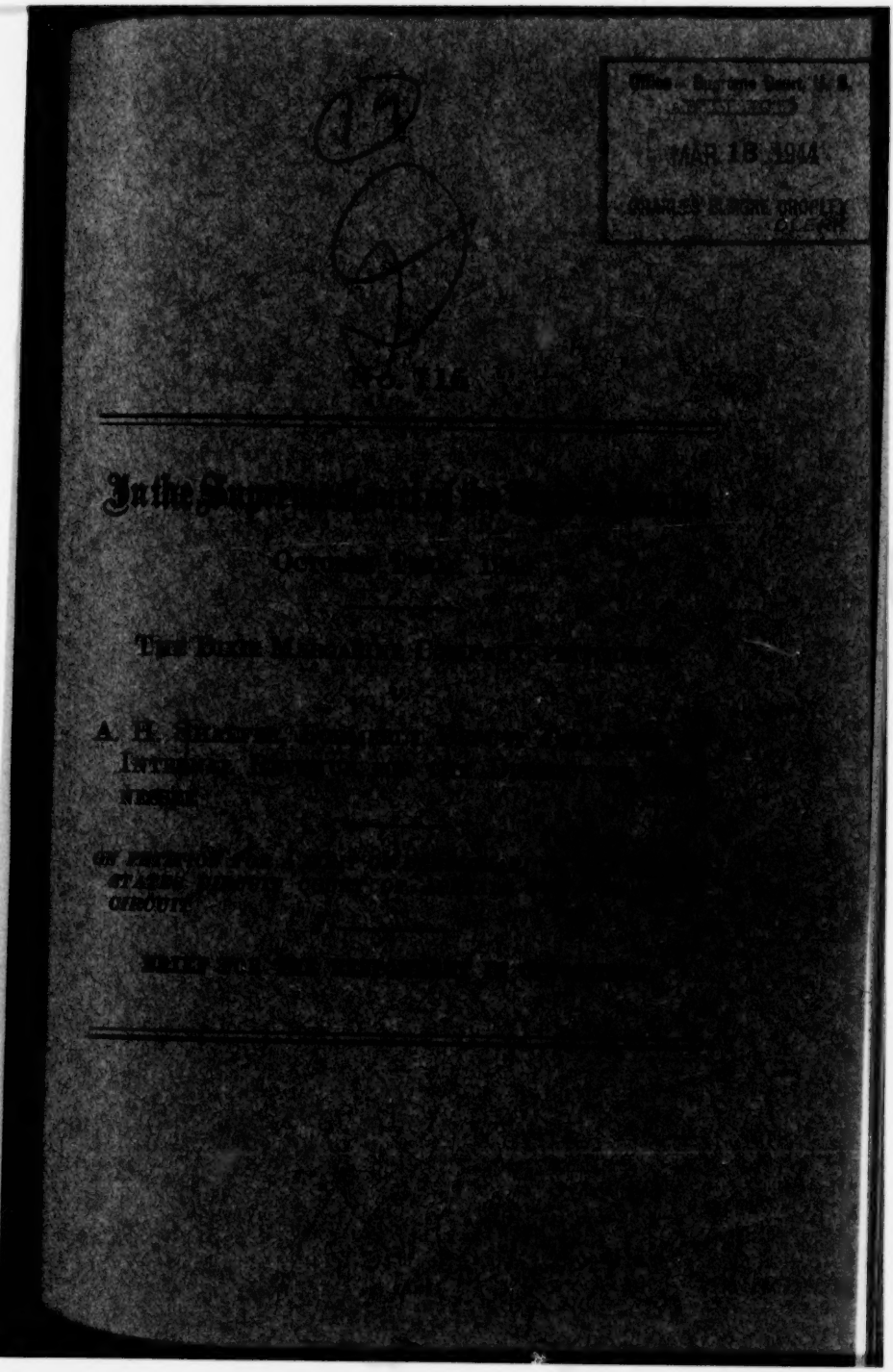

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 715

THE DIXIE MARGARINE COMPANY, PETITIONER

v.

A. H. SHAEFER, FORMERLY DEPUTY COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 26–33) is reported in 139 F. 2d 221.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 1, 1943 (R. 25). The petition for writ of certiorari was filed February 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of Section 3772 of the Internal Revenue Code, the District Court had jurisdiction over a suit for refund instituted in 1942 for taxes paid between 1923 and 1925, when no application for refund of such taxes was ever filed.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3772. SUITS FOR REFUND. (formerly R. S. 3226)
>
> (a) *Limitations.*—
>
> (1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallow-

ance of the part of the claim to which such suit or proceeding relates. * * * (26 U. S. C., Sec. 3772.)

STATEMENT

The taxpayer filed a complaint in the United States District Court for the Western District of Tennessee for the recovery of federal excise taxes paid under the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209, Sec. 3, as amended by the Act of May 9, 1902, c. 784, 32 Stat. 193, Sec. 2. The allegations of the complaint are that taxpayer is a Tennessee corporation with its principal place of business in Memphis, Tennessee, and that A. E. Shaefer is a resident of Memphis, Tennessee, and was Deputy Collector of Internal Revenue for the District of Tennessee in charge of the sale of federal revenue stamps from January 1, 1923, to December 1, 1925 (R. 2). It is alleged that taxpayer was, during the period here involved, engaged in the manufacture and sale of a food product commonly known as oleomargarine. Further, that the taxpayer before beginning the manufacture of oleomargarine inquired of and was advised by the office of the Collector of Internal Revenue that the product which it contemplated manufacturing would be subject to the oleomargarine tax. (R. 3.) The complaint alleges that the taxpayer began the manufacture of the product, commonly known as oleomargarine, in March 1923 and paid the federal excise tax to July 1931 in the amount of $329,231.64;

that a claim for refund in the amount of $241,819.64 was filed November 30, 1929, which claim was rejected December 26, 1929; that a second claim for refund was filed September 14, 1931, covering the period from December 1, 1925, to July 1931; that the claims were first rejected and that after the decision of this Court in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, the claims were reopened and paid on April 7, 1932. The taxpayer also alleges that the claim for refund filed November 30, 1929, and the subsequent claim filed September 14, 1931, related to the taxes paid subsequent to December 1, 1925, and that the tax amounting to $87,412 paid prior to December 1, 1925, was not refunded. It is alleged that the taxpayer instituted a suit for the recovery of the excise tax paid prior to December 1, 1925, in the United States Court of Claims and further that on November 4, 1935, that court sustained a demurrer filed by the United States and the complaint was dismissed.[1] (R. 4–6.) The taxpayer alleged in its amendment to the complaint in this case that A. E. Shaefer fraudulently represented to the taxpayer that its product was taxable as oleomargarine (R. 9).

The District Court sustained A. E. Shaefer's motion to dismiss, and the complaint was dismissed December 7, 1942 (R. 15). Upon appeal

[1] *Dixie Margarine Co.* v. *United States*, 12 F. Supp. 543, certiorari denied, 297 U. S. 713.

the court below affirmed the judgment of the District Court on December 1, 1943 (R. 25).

ARGUMENT

We think the decision below is correct in that the District Court did not have jurisdiction. No claim for refund was ever filed as required under R. S. 3226, now I. R. C. 3772.[2] It is well settled that the filing of a claim for refund is a necessary prerequisite to a suit for the recovery of internal revenue taxes. *Savings Institution* v. *Blair,* 116 U. S. 200; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *Tucker* v. *Alexander,* 275 U. S. 228; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62. Taxpayer has cited no case to the contrary. In an earlier case involving the identical taxes the United States Court of Claims held that it did not have jurisdiction. *Dixie Margarine Co.* v. *United States,* 12 F. Supp. 543, certiorari denied, 297 U. S. 713.[3] There have been no decisions since the denial of certiorari in that case which touch upon the problem.

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[2] Under R. S. 3228 (now I. R. C. 3313) such claims were required to be filed within four years after the date of payment of the tax.

[3] This decision of the Court of Claims, in a suit by petitioner against the United States for the recovery of the identical taxes, is also *res judicata* against petitioner. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 402–403, and cases cited. The Circuit Court of Appeals did not find it necessary to determine that question, but the point was raised by the motion to dismiss the complaint (R. 13).

This Court in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, a case relied upon by taxpayer, decided, over a strong dissent, that the collection of internal revenue taxes would be enjoined under certain circumstances. The injunction was sustained in that case, notwithstanding the provisions of Section 3224 of the Revised Statutes providing that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court", on the basis that the collection would, under the circumstances of that case, cause irrevocable injury. That decision is limited to Section 3224 of the Revised Statutes and should not be extended to other situations, as contended here. This taxpayer was advised prior to the time it began manufacturing that its product would be taxed. The taxes here involved were paid and would have been refunded had a timely claim been filed. The reason given in the *Nut Margarine* case, *supra,* for enjoining the *collection* of a tax could under no circumstances apply to suits for refund. Petitioner's attempt to convert a simple suit for refund of taxes into an action in equity for the establishment of a constructive trust does not change the nature of the proceeding or make the statutory provisions inapplicable.

The court below correctly stated in its opinion (R. 31) that the allegations of the complaint definitely show that respondent was entirely innocent of any acts of fraud, and the cited cases dealing with situations where fraud existed are

clearly inapplicable. There is no decision which supports the taxpayer's claim.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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